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December 6, 1993

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DEC - 6 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Mr. Caton:

Transmitted herewith on behalf of Richard P. Bott, II is the original with six copies of his Motion for Summary Decision with supporting Proposed Findings of Fact and conclusions of Law.

Yours very truly,

James P. Riley
Counsel for Richard P. Bott, II

JPR/rhw
Enclosure

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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DEC - 6 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re Application of

RICHARD BOTT, II
(Assignor)

and

WESTERN COMMUNICATIONS, INC.
(Assignee)

For Assignment of Construction
Permit of Station KCVI(FM),
Blackfoot, Idaho

MM DOCKET NO. 93-155

File No. BAPH-920917GO

Directed to: The Honorable Arthur I. Steinberg
Administrative Law Judge

MOTION FOR SUMMARY DECISION

**SUMMARY OF
MOTION FOR SUMMARY DECISION**

This motion argues that, on the basis of the showings made in the attached Proposed Findings of Fact and Conclusions of Law, there remains no genuine issue of material fact; that is, that after hearing the facts are not in controversy.

The principal task of this motion is to address paragraph 12 of the HDO. This motion shows that HDO par. 12 is dicta, addressed to resolution of a matter (an alternative argument advanced in a predesignation pleading) not relevant to the decision on the application.

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RICHARD BOTT, II)
(Assignor)) File No. BAPH-920917GO
and)
WESTERN COMMUNICATIONS, INC.)
(Assignee))
For Assignment of Construction)
Permit of Station KCVI (FM),)
Blackfoot, Idaho)

Directed to: The Honorable Arthur I. Steinberg
Administrative Law Judge

MOTION FOR SUMMARY DECISION

Richard P. Bott, II ("Bott"), by his counsel, hereby respectfully submits his Motion for Summary Decision and requests that all issues designated in the above-captioned proceeding be resolved in his favor and the assignment application granted.¹ With respect thereto, the following is stated:

I. PROCEDURAL BACKGROUND

1. On September 17, 1992, Bott filed the above-captioned application for consent to assignment of the construction permit for Station KCVI (FM) to Western Communications, Inc. The proposed

¹ By Order released October 29, 1993 (FCC 93M-686) the Presiding Judge authorized the filing of this motion. By informal request of counsel for Bott, and with consent of the other parties, the Presiding Judge orally permitted the filing of this motion on this date.

sale price of the construction permit was an amount no greater than Bott's expenses in acquiring the permit. On October 26, 1992, Radio Representatives, Inc. ("RRI"), which had been a competing applicant in the comparative proceeding which led to grant of the KCVI permit, submitted a "Petition to Deny" the assignment application. By Hearing Designation Order, 8 FCC Rcd 4074 (1993) ("HDO"), the assignment application was designated for hearing on the following issues:

- (a) To determine whether Richard P. Bott, II has misrepresented facts to or lacked candor with the Commission, either in connection with his integration pledge presented in the course of the Blackfoot, Idaho comparative hearing proceeding, or in his opposition to the petition to deny filed in the instant proceeding.
- (b) To determine, in light of the evidence adduced pursuant to issue (a), whether Richard P. Bott II is qualified to remain a Commission permittee.
- (c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the captioned application should be granted.

Id. at 4076.²

II. SUMMARY DECISION IS APPROPRIATE

2. Upon request by Bott, the Presiding Judge granted permission, pursuant to Section 1.251(a)(2) of the Commission's rules, to file this motion. (cite order) Bott maintains herein that the evidence adduced at the hearing in this matter warrants resolution of the issues on a summary basis, it having been shown

² No questions were raised or issues designated concerning the qualifications of Western Communications, Inc. to receive the permit by assignment. HDO n. 8.

that there is no genuine issue of material fact warranting consideration beyond a summary decision in Bott's favor. The attached Proposed Findings of Fact and Conclusions of Law demonstrate that on the evidentiary record, Summary Decision is warranted on the designated issues.

3. There is, however, what appears at first glance to be an anomalous passage in the HDO, one which might contradict the logical progression to a favorable conclusion under the last of the designated issues, which asks whether, "in light of the evidence adduced pursuant to the foregoing issues", the application for assignment of Bott's permit to Western Communications, Inc. should be granted. That anomalous passage, paragraph 12 of the HDO, says in one part that "unanticipated competitive circumstances are not sufficient to justify abandonment of the integration proposal and approval of the assignment application" and in another that "it appears irrelevant whether the consideration Bott receives merely covers his expenses in prosecuting his permit application to date." If these comments were in fact directed to the assignment application as submitted by Bott and to the showing required under Section 73.3597(c) of the rules for sale of an unbuilt permit, the comments would be at odds with the law as clearly established in the rules and as affirmed by a recent Commission ruling directly on this point. Moreover, these comments in paragraph 12 of the HDO would be at odds with other portions of the HDO itself.

4. Bott submits that it is unnecessary and would be unreasonable to read paragraph 12 so as to require the conclusion

that in one portion of the HDO the Commission accurately stated the law (paragraph 8 of the HDO) and shortly thereafter, in the same document, the Commission did an about face and wholly misstated the law. Particularly is this so in view of the Commission's recent and accurate statement of the law in Eagle 22, Ltd., 7 FCC Rcd 5295 (1992). There is an alternative and more reasonable explanation for paragraph 12 -- it is dictum addressed to an alternative argument made by Bott in opposing RRI's petition to deny. In that alternative argument, Bott asserted, essentially, that if Section 73.3597(a) did apply to his assignment application, as RRI claimed, then the changed circumstances claimed by Bott would meet the test of Section 73.3597(a)(4). In paragraph 12 of the HDO, the Commission is rejecting that alternative argument.

5. We believe that this analysis of paragraph 12's raison d'etre is correct, for the reasons shown below. First, it does address and resolve, as dicta, the alternative argument made by Bott in opposing the RRI petition to deny. Second, if taken as a statement of law governing the assignment of unbuilt construction permits, like Bott's, it is completely wrong, and the Presiding Judge ought not, if other explanations are more reasonable, conclude that the Commission has made a legal error.

A. Paragraph 12's resolution of the alternative argument made in Bott's opposition to RRI's petition, while perhaps correct, is, in this case, dictum.³

³ More formally, obiter dicta: "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the

- i. In its petition to deny, RRI claimed that Bott's assignment application was subject to Section 73.3597(a). HDO par. 3. If this were true, Bott would be required to make a showing pursuant to Section 73.3597(a)(4) of unavailability of capital, death, disability or other changed circumstances sufficient to justify the sale as being in the public interest, convenience and necessity. Bott opposed RRI's petition, arguing correctly that subpart (a) of § 73.3597 does not apply to the sale of an unbuilt permit. Mass Media Bureau ("MMB") Ex. 4, p. 6. However, Bott's opposition also argued that, if § 73.3597(a) did apply to this assignment, the changed circumstances set forth in Bott's opposition declaration would satisfy the exception for "other changed circumstances" contained in subpart (a)(4) of the rule. MMB Ex 4, p. 5; HDO par. 7. RRI argued in reply that the changed circumstances described in Bott's opposition are "insufficient" to warrant a nonhearing grant of the assignment pursuant to the subpart (a)(4) exception. HDO, par. 6. The somewhat imprecise and disorganized drafting of portions of the HDO is illustrated by the

case at hand are obiter dicta, and lack the force of an adjudication." Black's Law Dictionary, Revised Fourth Edition, West Publishing Co., 1968.

arrangement of pars. 6 and 7. Par. 7 opens with the words "In opposition", as if par. 7 was a rejoinder to par. 6, which described contentions of RRI. Contrary to the arrangement and appearance of the HDO, par. 7 contains a summary of Bott's opposition to RRI's petition, and par. 6 summarizes RRI's reply to par. 7. In par. 7 of the HDO, Bott is summarized as arguing that "a grant of the captioned application will conform to the public interest mandate of subparagraph (4) [of § 73.3597(a)]." In par. 6, RRI says, in reply, that that is not so; that the competitive changes described in Bott's opposition declaration are not equal to the "changed circumstances" required by subparagraph (4) to earn an exception to subpart (a)'s hearing requirement.⁴

- ii. Because the Commission affirmed in HDO par. 8 that "Section 73.3597(a)...is inapplicable to the

⁴ As another example of the somewhat imprecise and disorganized nature of portions of the HDO, one can examine HDO par. 11. There RRI's pleading containing an engineering comparison of the coverage of KCVI with that of KRSS is first referred to, incorrectly, as "RRI's opposition" and then, correctly, as RRI's "Reply". Having corrected its characterization of RRI's pleading to that of "Reply", the final pleading of a cycle, HDO par. 11 says, critically, that "Bott does not dispute" RRI's conclusion. In fact, the procedural rules barred Bott at that point from making a substantive response to RRI's engineering. Bott filed only a very brief "Request for Leave to Respond and Response", in which it was pointed out that KRSS had begun to use its higher powered Class C2 facilities. MMB Ex. 6.

instant situation", resolution of the dispute between Bott and RRI carried on in pars. 7 and 6 was not "necessarily involved nor essential to determination" of the assignment application. See, n. 5 supra. However, having in HDO par. 7 summarized Bott's opposition argument as being that "the new KRSS format qualifies as a changed circumstance" within the meaning of subpart (a)(4) of § 73.3597, the Commission appears to have been disinclined to leave that argument unresolved. Thus, HDO par. 12 addresses, imprecisely but clearly enough, and resolves the argument as to whether an unanticipated change in competitive circumstances meets the test of subpart (a)(4). The Commission there concludes that it does not. Because the Commission had already held, in HDO par. 8, that subpart (a) of § 73.3597 does not apply to this application, HDO par. 12 is dictum and thus it is not essential to the determination in this case, nor is the question whether par. 12 is an absolutely correct statement of the law of § 73.3597(a)(4) relevant to this case's determination. HDO par. 12 does not cite § 73.3597 or any subpart of that rule. This, Bott submits, is simply a further indication of the somewhat imprecise and disorganized nature of parts of the

HDO. As a still further indication, HDO par. 12 notes that "[a]lthough RRI raised this point, Bott cites no contrary authority, and none is apparent." In fact, RRI did not "raise" the point until its reply to Bott's opposition, when it attacked Bott's alternative argument. Bott had no further pleading rights. Moreover, this quoted statement from HDO par. 12 about the lack of "contrary authority" cannot apply to an application, like Bott's, being considered under 73.3597(c) rather than (a)(4), because the Commission earlier in the HDO acknowledged in citing Eagle 22, Ltd. that there is very apparent contrary authority if the dispute between RRI and Bott is being assessed under § 73.3597(c). It must follow that the discussion in HDO par. 12 is for the purpose of resolving the irrelevant dispute as to whether Bott's changed competitive situation amounts to the "changed circumstances" required by § 73.3597(a)(4). Viewed from that perspective, it is true that Bott's opposition (MMB Ex. 4) to RRI's petition did not cite authority for the alternative argument that the changed competitive situation qualified as a "changed circumstance" under § 73.3597(a)(4). It was, however, Bott's primary argument, sustained in HDO par. 8, that § 73.3597(a) did not apply.

- iii. If HDO par. 12 were viewed as something other than dicta, it would have required designation of an additional issue: i.e., to determine whether Bott has shown that sufficient changed circumstances exist adverse to his operation of KCVI to warrant a finding that the proposed assignment of the KCVI permit is in the public interest. Of course, no such issue was designated. In fact, HDO par. 13 ignores the existence of HDO par. 12. In HDO par. 13, the Commission said that questions of fact as to whether Bott had "misled or lacked candor with the Commission" about his intention to move to Blackfoot and integrate in station management "preclude[s] a finding pursuant to Section 309(a) of the Communications Act that the public interest, convenience, and necessity would be served by a grant" of the assignment application, and for that reason the application must be designated for hearing. Not a single word in HDO par. 13 suggests the application was set for hearing because Bott's reasons for the sale were prima facie insufficient, or that there would have been a hearing in the absence of "questions of fact" of misrepresentation or lack of candor.
- iv. Thus, HDO par. 12 is a classic example of obiter dictum and has no bearing on the determinations to

be made in this case. It resolves only a dispute arising from an alternative argument suggested by Bott in opposing RRI's petition, an argument the Commission, in HDO par. 8, found "inapplicable" to this case.

B. Paragraph 12 would be an inaccurate statement of the law governing the assignment of unbuilt permits.

- i. Section 73.3597 is the Commission's rule governing the transfer or assignment of construction permits or licenses for broadcast stations which have operated for less than one year or which have not commenced operation. Within that rule, subsection (a) applies to operating stations which have been operated on-air for less than one year. Subsection (b) defines the one-year period to which subsection (a) is applicable. Subsections (c) and (d) of that rule, on the other hand, apply to authorizations for stations which have not commenced operations. The Commission has held that subsection (a) of Section 73.3597 does not apply to an unbuilt station. TV-8, Inc., 2 FCC Rcd 1218 (1987). It is, however, only subsection (a) of Section 73.3597 that requires the assignor of a license or permit to make "an affirmative factual showing" establishing that due to changed circumstances FCC consent to the permit or license assignment or

transfer will serve the public interest, convenience and necessity. Subsection (c) contains no similar requirement to justify the assignment of an unbuilt permit. Instead, subsection (c) requires only that the assignor and assignee demonstrate that direct or indirect payments, including any retention by the seller of an interest in the station, involve no actual or potential gain to the seller over and above the legitimate and prudent out-of-pocket expenses for preparing, filing and advocating the grant of the permit for the station, and for other steps reasonably necessary toward placing the station in operation. Thus, on its face the rule does not require that the seller of an unbuilt permit provide any showing of changed circumstances justifying the sale.

- ii. Just one month before the filing of the assignment application at issue in this case, the Commission released its unanimous Memorandum Opinion and Order in Eagle 22, Ltd., 7 FCC Rcd 5295 (1992) in which the Commission stated: "The Assignment of Channel 22, an unbuilt station, is subject only to, and has met, the provisions of Section 73.3597 (c)-(d), which limit the consideration for the sale of an unbuilt station to legitimate and prudent expenses

incurred in connection with the construction of a station." Id., 5297 (footnotes omitted). In so ruling the Commission explicitly rejected the contention that the sale of Eagle's unbuilt permit could not be approved without hearing unless Eagle made an affirmative factual showing of changed circumstances sufficient to justify the sale. Id. Like Bott, Eagle had received its construction permit through a comparative hearing.⁵ Eagle is, in every respect, squarely on target as precedent for the conclusion that Bott was not required to submit a factual showing justifying the sale of his construction permit on the basis of changed circumstances.

- iii. Furthermore, the Commission has shown that it does not intend to amend Section 73.3597(a) to bring applications for sale of unbuilt permits within the requirements of that subsection, nor to amend Section 73.3597(c) to add a requirement that the seller of an unbuilt permit provide a statement of the circumstances leading to the decision to sell. On July 19, 1993, the month after this case was designated for hearing, the Commission adopted a Further Notice of Proposed Rulemaking in

⁵ Fort Collins Telecasters, 103 F.C.C. 2d 978 (Rev. Bc. 1986), review denied, 2 FCC Rcd 2780 (1987), aff'd per curiam, 841 F. 2d 428 (D.C. Cir. 1988).

Reexamination of the Policy Statement on Comparative Broadcast Hearings, 8 FCC Rcd 5475 (1993). In the first paragraph of that Further Notice, the Commission stated clearly the scope of its proposal: to lengthen the holding period to three years from the current one year for successful applicants in comparative proceedings who begin to operate their stations and become subject to Section 73.3597(a). In paragraph 10 of the Further Notice, the Commission expresses the concern at the heart of Section 73.3597(a), and why that rule contains requirements not found in Section 73.3597(c). In paragraph 10, discussing the proposal to lengthen the period for which an operating station must be held before it could be sold, the Commission said: "[a]pplicants with no serious interest in effectuating their proposals and intending to sell after one year to make a quick profit would lose that opportunity."⁶ In concluding the Further Notice, the Commission outlined "Questions for Comment" in paragraph 17. Those questions do not suggest in any way the possibility that Section 73.3597(c) would be

⁶ In contrast to the opportunity for profit from the sale of an operating broadcast station, the Commission's rules have never permitted a seller to profit from the sale of an authorization for a broadcast station which has not commenced operations.

amended to require an affirmative showing of circumstances warranting consent to the sale of an unbuilt permit. Thus, although it had the obvious opportunity to propose an amendment to Section 73.3597(c) to add a requirement that a compelling change of circumstances be demonstrated, the Commission made no such proposal.

- iv. Finally, in the HDO in this case the Commission correctly evaluated the argument advanced by RRI that Section 73.3597(a) applied to this assignment application. RRI argued that "the assignment application must be designated for hearing pursuant to 47 CFR § 73.3597(a)...", HDO, par. 3, that "Bott's 'changed circumstances' are insufficient..." and that "changed financial circumstances do not warrant a transfer of Bott's permit." HDO, par. 6. The Commission rejected RRI's argument, stating that "Section 73.3597(a) of the Commission's Rules is inapplicable to the instant situation." HDO, par. 8. In short, this case's HDO has the effect of reaffirming the holding of Eagle 22, Ltd., supra, that the assignment of an unbuilt permit is subject only to the cost recovery limitation and does not require any showing of changed circumstances to justify the sale.

- v. For all of the foregoing reasons, HDO par. 12 would be an inaccurate statement of the law governing the assignment of unbuilt permits if it were taken as such. Within itself, par. 12 does not make the claim that it is to be taken as an ad hoc amendment of Section 73.3597 or as a reversal of TV-8, supra and Eagle 22, Ltd., supra, both of which are cited in the HDO, nor does it contain any reference to par. 8 in the HDO wherein the Commission reaffirms the inapplicability of subsection (a) of Section 73.3597 to this application, a reaffirmation which would be contradictory to an interpretation of HDO par. 12 as stating the law applicable to the assignment of an unbuilt permit.
- vi. Moreover, general principles of administrative law hold against interpreting HDO par. 12 as announcing a change in the law applicable to the sale of unbuilt permits including Bott's. That is, if the law has been as it appears to be on the face of Section 73.3597, as it was held to be in Eagle 22, Ltd., supra, and as it was again held to be in par. 8 of the HDO, HDO par. 12 cannot plausibly be interpreted as pronouncing a change in the law for this case and future cases. First of all, par. 12 itself does not say that it is such a pronouncement, as it surely would if it were so

intended. It does not say that Eagle 22, Ltd., supra, is being reversed, it does not say that new policies are being added to the requirements of Section 73.3597(c),⁷ and it does not contain any conscious recognition that, if it were setting a new standard for the sale of unbuilt permits, it would be a departure from par. 8 of the very same HDO. The only cases cited in HDO par. 12 are cases which do not involve the sale of permits or licenses for built or unbuilt stations.⁸

- vii. At a minimum, if HDO par. 12 had been intended to establish new requirements for the sale of unbuilt permits which would apply to Bott, the Commission would have been obliged to explain what warranted the change; i.e., why it was justified in imposing different requirements on Bott than were imposed on the identically situated seller in Eagle 22, Ltd. Melody Music, 345 F. 2d 730 (D.C. Cir. 1965). So long as a rule or regulation remains in effect the

⁷ In this regard, see par. 5. A. iii., supra, discussing the Commission's proposal to amend Section 73.3597 adopted the month after the HDO in this case.

⁸ Triangle Publications, Inc., 29 F.C.C. 315 (1960), aff'd, sub. nom. Triangle Publications, Inc. v. F.C.C., 291 F. 2d 342 (1961), involved Commission denial of a licensee's modification application based on adverse economic impact on another licensee. PZ Entertainment Partnership, L.P., 6 FCC Rcd 1240 (1991), involved Commission denial of a request for waiver of the city grade coverage requirements made in a permit modification application.

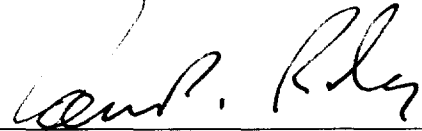
Commission, like the public to whom the rule is directed, is bound by the rule. CBS v U.S., 316 U.S. 407 (1942). The absence of any acknowledgement in HDO par. 12 that the law had been, until the moment of par. 12's adoption, as it was stated in Eagle 22, Ltd., supra, and the absence of any explanation for a change in the law, make it both implausible and contrary to legal principles to interpret HDO par. 12 as being intended by the Commission to change the established requirements for the sale of unbuilt permits and to then apply such a change to Bott. Bott submits that the Commission did not intend HDO par. 12 to be so interpreted. Instead, as shown in the preceding section of this motion, HDO par. 12 appears to have been drafted, albeit imprecisely, as a response to an alternative argument submitted on Bott's behalf in opposing RRI's petition to deny.

CONCLUSION

Because it must be concluded for the reasons set forth above that HDO par. 12 is dictum and does not govern the determination to be made in this proceeding, this case is to be decided solely on the basis of conclusions reached on designated Issues (a), (b) and (c). The evidence of record is clear as are the conclusions to be drawn, as shown in the attached Proposed Findings of Fact and Conclusions of Law, and Summary Decision and a grant of the application is appropriate.

Respectfully submitted,

RICHARD P. BOTT, II

By: 

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 1300 North 17th Street
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 December 6, 1993

CERTIFICATE OF SERVICE

I, Roberta Wadsworth, a secretary in the law offices of Fletcher, Heald & Hildreth, hereby certify that I have on this 6th day of December, 1993, had copies of the foregoing "MOTION FOR SUMMARY DECISION" mailed by U.S. Mail first class, postage prepaid, to the following:

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Application of)	MM Docket 93-155
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RICHARD BOTT II)	File No. BAPH-920917GO
(Assignor))	
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For Assignment of Construction)	
Permit of Station KCVI(FM),)	
Blackfoot, Idaho)	

TO: The Honorable Arthur I. Steinberg

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

**SUMMARY OF
PROPOSED FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

In this filing Richard P. Bott, II shows that he has not misrepresented facts to or lacked candor with the Commission in the Blackfoot, Idaho comparative case or in this assignment proceeding.

He further shows that the assignment application should be granted, since resolution of the misrepresentation and lack of candor issue in his favor removes the only impediment to grant.